Bartenders' and Beverage Dispensers' Union, Local 165 (Nevada Resort Association) *and* **William Kent Dickson.** Case 31-CB-3442

April 28, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 20, 1981, Administrative Law Judge James M. Kennedy issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Bartenders' and Beverage Dispensers' Union, Local 165, Las Vegas, Nevada, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Add to the end of paragraph 1(a), "that are related to an alleged failure to properly refer such registrants."

2. Add to the end of paragraph 2(a), "that are related to an alleged failure to properly refer the requesting applicant."

3. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER FANNING, dissenting:

Unlike my colleagues, I would not adopt the Administrative Law Judge's finding that Respondent violated Section 8(b)(1)(A) by refusing to allow Dickson the right to review its hiring hall records.

The stipulated facts indicate that Respondent operates an exclusive hiring hall under its collective-bargaining agreement with the Nevada Resort Association, whereby it refers bartenders for employment to members of the Association. Dickson, a bartender who had apparently requested referral to employment through Respondent, requested that Respondent's business manager, Stafford, grant him access to Respondent's out-of-work records because Dickson suspected that an individual had been improperly referred to a job ahead of him. Stafford replied that neither Dickson nor any other member could see the list, but if Dickson had a complaint about a specific individual, Stafford would check the list and tell Dickson what he found. Dickson apparently gave Stafford no more specific information as to what he wanted to check.

More than a month later Dickson again asked to see the list and was again refused by Stafford. In addition, Respondent's attorney wrote a letter to Dickson stating that the Union would not allow anyone unlimited access to the hiring hall's records, "absent a showing of good cause or a court order forcing the Union to turn the records over," citing the confidentiality of the records and that it would be burdensome to turn the records over at every request. The attorney invited Dickson to submit in writing a description of any incident in which he thought he had been denied referral, and the Union would look into his charges and make available to him "the data relevant to any good faith specific request." Dickson provided no information.

The Administrative Law Judge specifically found no evidence of discriminatory treatment toward the referral applicant. However, he found that because Dickson's request was not one which would create a burden on Respondent, and Respondent's records did not contain information which could be deemed confidential as to other applicants, Respondent violated its duty of fair representation to Dickson by denying him the right to review the hiring hall records and thereby violated Section 8(b)(1)(A).

In *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, Associated General Contractors of America, Inc.)*, 226 NLRB 587 (1976), a case relied on by the Administrative Law Judge in finding the violation here, I dissented from finding that the union violated Section 8(b)(1)(A) by refusing to supply a referral applicant with a list of names and addresses from the out-of-work records. True, in that case the applicant wanted more than a chance to examine the records on his own, as is the case here. However, the similarities between that case and this which I believe require a finding of no violation are the absence of discriminatory conduct or bad faith on the part of the Union in dealing with its members, or with nonmember referral applicants. In this case, there is absolutely no evidence of any activity on the part of Respondent which could be character-

ized as restraining or coercing Dickson or any other referral applicants.

On at least two occasions Respondent's representatives offered to satisfy any inquiry Dickson had if he would give them the information necessary to investigate the records, but Dickson would not cooperate. True, it is possible that the information Respondent would have furnished Dickson may not have been satisfactory to him, thereby perhaps necessitating further investigation of the records, but Dickson denied them the opportunity to make a good-faith effort to satisfy any legitimate inquiry he might have.

As I stated in my dissent in *Local 324, supra*, "The duty of fair representation was not developed for application to these housekeeping matters nor to justify Board or court supervision of a union's everyday affairs, the efficiency of its services, or its responsiveness to its members." That is a job for the Union's constituents.

As I would find there was nothing in Respondent's actions which restrained or coerced Dickson in this case, or could have had the tendency to do so, I would dismiss the complaint.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT breach our duty of fairly representing employees whom we represent in collective bargaining by denying them, when they are properly registered on the out-of-work list, the right to review and inspect any hiring hall records in circumstances where employers such as the members of the Nevada Resort Association are contractually required to seek employees through this Union and where such records are related to an alleged failure to properly refer registered employees.

WE WILL NOT in any like or related manner restrain or coerce employees in their exercise of rights guaranteed in Section 7 of the Act.

WE WILL honor requests by William Kent Dickson or any other bona fide referral registrant to review or inspect the records we maintain to operate our exclusive hiring hall that are related to an alleged failure to properly refer the requesting registrant.

BARTENDERS' AND BEVERAGE DISPENSERS' UNION, LOCAL 165

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge: On November 15, 1979,[1] the Regional Director for the National Labor Relations Board for Region 31 issued a complaint accusing Bartenders' and Beverage Dispensers' Union, Local 165 (herein called Respondent), of having violated Section 8(b)(1)(A) of the National Labor Relations Act (herein called the Act). His complaint is based upon an amended charge filed on October 30 by William Kent Dickson, an individual (herein called Dickson). On November 21, Respondent filed its answer admitting in part and denying in part certain allegations in the complaint. On March 16, 1981, the parties moved to waive a hearing before the Board and submitted a factual stipulation seeking a decision by an administrative law judge. The motion was referred to me as the duly assigned judge and on March 17 I granted the motion. Briefs were thereafter filed and have been carefully considered.

Issue

Whether or not a union which operates an exclusive hiring hall breaches its duty of fair representation by barring a referral applicant from examining the records the union utilizes in operating the hiring hall.

Pursuant to the stipulation, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS

The Nevada Resort Association is a multiemployer collective-bargaining association consisting of numerous resort hotels in Las Vegas, Nevada. During the past calendar year, the Association's members, collectively and in the aggregate, received gross revenues in excess of $500,000 and purchased goods and services valued in excess of $50,000 from suppliers located outside Nevada. Accordingly, I find that the Association and its members are employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. RESPONDENT'S CONDUCT ALLEGED TO VIOLATE THE ACT

Respondent is, and has been at all material times, the exclusive collective-bargaining representative of all bar-

[1] All dates are 1979 unless otherwise indicated.

tenders employed by the Association and its employer-members. In its representative status, it negotiated a collective-bargaining contract with the Association known as the "Strip Agreement" for the years 1976–80. That agreement establishes an exclusive hiring and job referral procedure under which the Association and its employer-members are obligated to hire bartenders exclusively through Respondent's hiring hall. As a result, Respondent's hiring and job referral procedures significantly affect the employment opportunities of employees who are covered by that agreement and who seek to work at Association hotels.

The individual who administers the collective-bargaining agreement for Respondent was at all material times its secretary-treasurer and business manager, Jack Stafford. Although not specifically recited in the stipulation, I infer that Dickson is a bartender seeking work through Respondent's hiring hall and during 1979 had requested referral to an Association hotel through Respondent's hiring hall.

The stipulation recites that on September 18 Dickson requested Stafford to grant him access to Respondent's out-of-work records, a request which is arguably relevant to Dickson's maintenance of employment opportunities. On September 18, Stafford refused to provide Dickson with access to that information. Dickson told Stafford he wished to see the out-of-work list because Dickson suspected an individual had been improperly referred to a job ahead of him. Stafford replied that neither Dickson nor any other member could see the list, but if Dickson had a complaint about a specific individual, Stafford would check the list and tell Dickson what he found. In that conversation Stafford did not give Dickson any further reasons for the denial of his request to see the list. Dickson never requested anything more than the opportunity to inspect the out-of-work record or to accompany Stafford while Stafford inspected them.

In late October or early November, after the instant charge was filed and after Stafford had spoken with an NLRB agent, Dickson again asked if he could see the out-of-work list. Stafford continued to refuse Dickson permission to examine the list and gave no further reason for the denial.

On October 26 Respondent's attorney, Philip Bowe, wrote Dickson a letter saying, *inter alia*: "The Union will not allow *anyone*, Union member or not, unlimited access to the hiring hall's records, absent a showing of good cause or a court order forcing the Union to turn the records over." Bowe then cited several reasons for the denial including an assertion that the material shown on the records included names, telephone numbers, addresses, social security numbers and the fact that applicants were unemployed. Bowe stated there were many people who might be interested in that information, but the Union believed many of those on the list did not want that information to be divulged, particularly as it might fall in the hands of an "IRS agent, ex-spouse, or potential employer. . . ." Accordingly, he said, the Union perceived an obligation to keep the information confidential and to deny its access to anyone who did not have a specific reason or a court order. He also asserted it would be burdensome to turn the records over at every request. Bowe then offered Dickson the opportunity to submit in writing a description of any incident where he believed he had been denied a referral, asking Dickson to provide relevant names, dates, and any other information. If Dickson did that, Bowe said, the Union would look into his charges and make available to him "the data relevant to any good faith specific request."

Bowe was somewhat mistaken in his assertion regarding the contents of the out-of-work list for it actually shows only the names of applicants, their "out-of-work date,"[2] a telephone number, recent places of employment and hotels where the applicant does not wish to work or hotels which do not wish to employ the applicant.

IV. ANALYSIS AND CONCLUSIONS

Counsel for the General Counsel asserts that a union which operates an exclusive hiring hall must, under the doctrine of the duty of fair representation, permit a referral applicant to view the Union's referral records. In support of that view, she cites *Local No. 324, International Union of Operating Engineers, AFL–CIO (Michigan Chapter, Associated General Contractors of America, Inc.)*, 226 NLRB 587 (1977).

Respondent, anticipating a *Local 324* argument, attempts to distinguish it on its facts and relies principally on the Supreme Court's decision in *Vaca, et al.* v. *Sipes*, 386 U.S. 171 (1967), which held that the duty of fair representation is breached only when a union's conduct toward a member of the collective-bargaining unit is "arbitrary, discriminatory or in bad faith." This, Respondent asserts, cannot be shown here. Certainly its assertion is correct to the extent that the Union's conduct here is innocent of discriminatory purpose.

Recently, the Supreme Court again dealt with the fair representation doctrine in *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42 (1979). The Court there said the fair representation duty is an obligation placed upon unions which hold exclusive bargaining rights for the employees and the obligation flows from that status. The Court said at 46–47:

> This Court first recognized the statutory duty of fair representation in *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), a case arising under the Railway Labor Act. *Steele* held that when Congress empowered unions to bargain exclusively for all employees in a particular bargaining unit, and thereby subordinated individual interests to the interests of the unit as a whole, it imposed on unions a correlative duty "inseparable from the power of representation" to exercise that authority fairly. *Id.* at 202–204; see *Humphrey* v. *Moore*, 375 U.S. 335, 342 (1964); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).[8]

[8] The duty of fair representation is also implicit in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. § 151 *et*

[2] It is not clear if this date is the date the applicant was placed on the list or the last date he or she was employed.

seq., because that statute, like the Railway Labor Act, affords unions exclusive power to represent all employees of a bargaining unit. See, e.g., *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953); *Vaca* v. *Sipes*, 386 U.S. at 177.

As the Court noted, the duty of fair representation, while not specifically explicated is nonetheless implicit in the National Labor Relations Act. Since *Miranda Fuel Company, Inc.*, 140 NLRB 181 (1962), the Board has consistently held that view, although there was some doubt of the Board's authority until the Court decided *Vaca* v. *Sipes, supra*, in 1967. In *Vaca*, generally following *Miranda*, the Court stated that a union breaches its duty of fair representation when its conduct is "arbitrary, discriminatory . . . in bad faith . . . or process[es] a grievance in a perfunctory fashion." *Vaca* v. *Sipes, supra* at 190–191.

In conformity with these views, the Board has held that a union breaches the duty when it refuses to provide an employee with information about its hiring hall rules, an arbitrary act. *Laborers International Union of North America, Local 252, AFL–CIO (Seattle and Tacoma Chapters of Associated General Contractors of America, Inc.)*, 233 NLRB 1358, 1361 (1977). The Board there held that denying the referral applicant information about the rules, set forth in the collective-bargaining agreement, breached the duty of fair representation because "inherent in [the duty] is an obligation to deal fairly with an employee's request for information as to his relative position on the out-of-work register . . ." citing *Local 324, supra*. Chairman Fanning dissented in part refusing to adhere to the *Local 324* rationale, relying instead on evidence of discrimination based on the applicant's nonmembership and because he had filed NLRB charges against the Union. However, the panel majority agreed with the Administrative Law Judge's assessment that simply denying the registrant the out-of-work rules violated the duty.

I also observe that under Section 104 of the Labor Management Reporting and Disclosure Act of 1959 labor unions are obligated to give bargaining unit employees a copy of the collective-bargaining agreement regulating his or her employment.

Here the hiring hall provisions are part of the "Strip Agreement" and no doubt the records utilized to operate the hiring hall may fairly be considered an adjunct to that contract. It is probable, therefore, that the LMRDA mandates that such hiring hall records be shown to represented employees.[3]

In any event, combining the LMRDA's prohibition against concealment with the above-cited decisions of the Board and the Supreme Court, I conclude that it is our national policy to require labor unions which hold exclusive representational rights to be open and candid about business having a direct impact upon a represented employee's employment opportunities. See, particularly, *Laborers Local 252, supra.*

Certainly it is the Board's explicit duty under Section 8(b)(2) to regulate hiring halls to prevent employment discrimination based on union membership considerations. *Local Union No. 269, International Brotherhood of Electrical Workers, AFL–CIO (Mercer County Division, New Jersey Chapter, NECA)*, 149 NLRB 768 (1969), enfd. 357 F.2d 51 (3d Cir. 1966). And, implicitly, the Board has the duty to regulate hiring halls through the fair representation doctrine, as set forth under Section 8(b)(1)(A). *I.B.E.W.* v. *Foust, supra*, and *Laborers Local 252, supra*. That being the case, does the Board have the concomitant authority to order hiring halls to be opened to referral applicants?

In analyzing hiring hall cases from a remedy point of view, it is clear that the Board does have the authority to order unions to open their hiring hall records. It has done so in discrimination cases involving lack of membership,[4] concerted activity,[5] and filing charges with the Board.[6]

My research, however, has disclosed no case as naked of specific discrimination against the hiring hall referral registrant as is the case before me. Even so, I do not find the absence of discrimination to justify Respondent's conduct here. Respondent is the exclusive collective-bargaining representative of bartenders who work at or seek to work at the Strip hotels and has an obligation of fair dealing with regard to them. Indeed, by obtaining from those hotels the right to refer employees, the Union is acting in the interest of employers as well as employees and thus has a dual role and therefore a double responsibility of care. While I would not go so far as to say that its duty is "fiduciary" in the sense that it is with respect to enforcing union-security obligations[7] nonetheless its duty to employees seeking employment in the industry is high. Considering that a union in operating a hiring hall always risks making an error, has the potential to discriminate against employees based on union membership, or may otherwise breach the duty of fair representation, it seems to me that unless the records are burdensome or contain truly confidential material, a union is obligated to show its hiring hall lists and records to any referral applicant affected by them. Failure to do so would constitute an arbitrary act as defined by *Miranda* and *Vaca* and would therefore be a breach of the duty of fair representation.

I reject Respondent's contention here that the data contained in its hiring hall records are confidential. The records minimally show only the name and telephone number of the applicant. They may also show his last place of employment or an employer for whom he does not wish to work. His name and telephone number are not confidential for they are probably available through the telephone directory to anyone seeking them; the fact that he is unemployed would be of no consequence to an

[3] I do not suggest that it is the Board's duty to enforce the LMRDA; that responsibility rests with the Secretary of Labor.

[4] *Lower Ohio Valley District Council of Carpenters, Millwrights Local Union No. 1080, United Brotherhood of Carpenters and Joiners of America (Burch & Lamb Corp.)*, 255 NLRB 80 (1981).

[5] *Local 90, Operative Plasterers and Cement Masons' International Association of United States and Canada, AFL–CIO (Southern Illinois Builders Association)*, 236 NLRB 329 (1978), enfd. 606 F.2d 189 (7th Cir. 1979).

[6] *International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local Lodge No. 587, AFL–CIO (Stone & Webster Engineering Corporation)*, 233 NLRB 612 (1977).

[7] *Rocket & Guided Missile Lodge 946, International Association of Machinists and Aerospace Workers, AFL–CIO (Aerojet-General Corp.)*, 186 NLRB 561, 562 (1970), and cases cited in fn. 1 therein.

individual who is also unemployed but who might be competing for the same job. Nor would his last place of employment or an employer for whom he did not wish to work be of significant detriment to require confidential protection. The only thing which might require confidentiality would be an employer's statement that an individual was not eligible to work there. Those remarks do not appear to be numerous and could easily be masked if necessary. Certainly, Respondent's records are not burdensome and would be no particular hardship to reveal. Here Dickson simply asked to accompany Respondent's business manager in reviewing the records. He did not even ask for copies. In no way did he seek to burden Respondent with unnecessary work.[8] Finally, contrary to Respondent's assertion, there is no suggestion here that the general public is entitled to review the hiring hall records; the right inures only to individuals actually utilizing the hiring hall to seek employment.

Accordingly, I conclude that Respondent violated its duty of fair representation to Dickson by denying him the right to review the hiring hall records and thereby violated Section 8(b)(1)(A) of the Act.

IV. THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. As it has been found that Respondent violated the Act by denying Dickson the opportunity to review its hiring hall records, I shall order it to make those records available to Dickson and to any other bona fide referral registrant whose employment opportunities are affected by them.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The hotels which are members of the Nevada Resort Association are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By denying William Kent Dickson, a referral registrant, the opportunity to review and inspect the hiring hall records maintained by Respondent, Respondent acted arbitrarily and in breach of its duty of fair representation and thereby violated Section 8(b)(1)(A) of the Act.

[8] Apparently Business Manager Stafford had no objection to doing at least some "extra" work for he, and later attorney Bowe, said they would do so if given information about whatever incident Dickson wished to inquire. However, their offer is inadequate, for Dickson would still be unable to ascertain the truth of whatever report might be made since he could not independently verify it. Moreover, Respondent's requirement that the alleged facts be put in writing seems unnecessary and irrelevant to any legitimate administrative purpose.

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[9]

Bartenders' and Beverage Dispensers' Union, Local 165, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Breaching its duty of fair representation to hiring hall referral registrants by denying them the right to review and inspect the records maintained by Respondent in the operation of its exclusive hiring hall as operated under the collective-bargaining agreement known as the "Strip Agreement" between Respondent and the Nevada Resort Association.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Honor requests by William Kent Dickson or any other bona fide referral applicant to inspect or review the records maintained by Respondent in the operation of its exclusive hiring hall.

(b) Sign and post at its offices and meeting halls in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms to be provided by the Regional Director for Region 31, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(c) Deliver to the Regional Director for Region 31, signed copies of said notice in sufficient numbers to be posted by the resort hotels which are members of the Nevada Resort Association, if willing.

(d) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[9] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[10] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."